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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DOMINICK PHILIP DEBENEDICTIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NINTH CIRCUIT

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TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES II

QUESTIONS PRESENTED FOR REVIEW III

JURSIDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE. 4

ARGUMENT 6

1. Petitioner's Constitutional Right of Due Process Was Violated As a Result Of The Court Denying Him A Voluntariness Hearing And Permitting A Respondent To Put Into Evidence Statements Made By Petitioner. 6

2. Petitioner Was Denied A Fair Trial As A Result Of The Court Taking His Motion For A Judgement Of Acquittal Under Advisement. 13

3. Petitioner Was Denied A Fair Trial As A Result Of The Court Denying Him An Opportunity To Present His Case After The Respondent Had Been Allowed To Reopen And Subsequently Reclosed It's Case 21

CONCLUSION 24

APPENDIX . . . . . .

TABLE OF CASES AND AUTHORITIES

PAGE

Cooper v. United States,
321 F.2d 274 (1963). 18

Jackson v. Denno,
A 4 S. Ct. 1774 (1964) . . .8, 9, 12

Jackson v. United States,
250 F.2d 897 (1958). 17, 19

Malinski v. New York,
324 U.S. 401, 65 S. Ct. 781,
89 L.Ed. 1029. 8

Morgan v. United States,
380 F.2d 686 (1968). 19

Payne v. Arkansas,
356 U.S. 534, 81 S. Ct. 844,
2 L.Ed.2d 975 8

Rogers v. Richmond,
365 U.S. 534, 81 S. Ct. 735,
5 L.Ed.2d 760 8

Stroble v. California,
343 U.S. 181 72 S Ct. 599,
96 L.Ed. 872 8

Sullivan v. United States,
414 F.2d 714 (1969). 17

T'Kach v. United States,
5 Cir., 1957, 242 F.2d 937 . . . 17

United States V. Sisack,
527 F.2d 917 (1979). 19

TABLE OF CASES AND AUTHORITIES, cont.

PAGE

Statutes:

18 USC 1542. 2

28 USC 1254 or 1255. 3

Rules:

Rule 40, Federal Rules of Appellate Procedure. 2

Rule 29, (a) and (b), Federal Rules of Criminal Procedure. 15

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's Constitutional Right of due process was violated as a result of the Court denying him a valuntariness hearing and permitting Respondent to put into evidence statements made by Petitioner.

2. Whether Petitioner was denied a fair trail as a result of the Court taking his motion for a judgement of acquittal under advisement.

3. Whether Petitioner was denied a fair trial as a result of the Court denying him an opportunity to present his case after the Respondent had been allowed to reopen and subsequently reclosed it's case.

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This matter originated as a result of a Federal Grand Jury Indictment wherein Defendant was accused of willfully and knowingly making a false statement in an application for a passport in violation of

18 U.S.C. 1542. The case was tried to a jury in the Federal District Court, District of Arizona, which resulted in judgement being entered against Petitioner with a finding of guilty on June 17, 1981, a copy of said judgement appended hereto as Exhibit A. Defendant was sentenced on the 20th day of July, 1981, by the Hon. Earl H. Carroll. On the 29th day of July, 1981, Defendant filed his notice of appeal with the United State Court of Appeals, Ninth Circuit, appealing from the judgement and sentence. The matter was submitted to the Court on February 5, 1982, appended hereto as Exhibit B, affirming the judgement of the lower Court. On March 30, 1982, Petitioner pursuant to Rule 40, Federal Rules of Appellate procedure filed for rehearing with the United States Court of Appeals.

On April 30, 1982, an Order was entered for the United States Court of Appeals for the Ninth Circuit amending the Memorandum disposition of March 17, 1982, and further denying the petition for rehearing, a copy of said Order being appended hereto as Exhibit C.

Jurisdiction is conferred by 28 USC 1254 or 1255, this being an application for Writ of Certiorari to determine whether such holdings by both the trial and Appellate Courts is repugnant to the Constitution of the United States.

RELEVANT CONSTITUTION AND STATUTORY PROVISIONS

Amendment V, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime. unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life. liberty, or property, without due process of law; nor shall private property be taken for public use. without just compensation."

STATEMENT OF THE CASE

The facts relevant to this Appeal initiate with the testimony of the Respondent's first witness, special agent OVIDIO CERVANTES of the F. B. I. Over Petitioner's objection agent CERVANTES was permitted to testify as to a conversation between agent CERVANTES and the Peti-

tioner, whereat Petitioner made certain statements in answer to agent CERVANTES questions, and certain statements made by Petitioner after he was placed under arrest. Prior to Petitioner's statements being put into evidence, Petitioner had requested a voluntariness hearing for the purpose of determining whether the statements were made voluntarily (see reporter's transcript, pages 45 and 47).

At the close of the Respondent's case, Petitioner made a motion for a directed verdict and judgement of acquittal (reporter's transcript, pages 241 and 242). The motion was taken under advisement, despite the fact that none of the witnesses had identified the Petitioner at the close of the Respondent's case. At the close of the Government's case, and after Petitioner had rested, and awhile the motion for judgement of

acquittal was still under advisement, the Prosecution was permitted to reopen it's case. After the presentation of this additional evidence, the Prosecution again rested. The Court immediately had the Prosecution proceed with it's opening argument (reporter's transcript, page 246), without giving Petitioner an opportunity to present a case and while still holding the Motion for Judgement of Acquittal under advisement.

ARGUMENT

1. Petitioner's Constitutional Right Of Due Process Was Violated As a Result Of The Court Denying Him A Voluntariness Hearing And Permitting Respondent To Put Into Evidence Statements Made By Petitioner.

When agent CERVANTES was first questioned concerning conversations he had with Petitioner, Petitioner timely objected thereto on the basis that any such statements made by Petitioner were not done so voluntarily. At that time, Petitioner also requested a voluntariness hearing to determine this issue. While the Court did permit extensive testimony on the part of agent CERVANTES, on the question of whether these statements were made voluntarily, the Court never granted a voluntariness hearing and Petitioner was never given the opportunity to present witnesses or further evidence out of the presence of the jury to consent this issue. Consequently, the Court's ruling that there was no evidence that the statements were not made voluntarily resulted from a denial of opportunity to present such evidence.

By admitting the statements made by Petitioner over Petitioner's objection and in the absence of a full voluntariness hearing, the Court denied the Petitioner due process and thereby committed reversible error. Jackson v. Denno, A 4 S. Ct. 1774 (1964).

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L.Ed.2d 760, and even though there is ample evidence aside from the confession to support the conviction. Malinski v. New York, 324 U.S. 401, 65 S. Ct. 781, 89 L.E.d. 1029; Stroble v. California, 343 U.S. 181, 72 S. Ct. 599, 96 L.Ed. 872; Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L.Ed. 2d 975. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Rogers v. Richmond, Supra. In our view, the New York procedure employed in this case did not afford a reliable

determination of the voluntariness of the confession offered in evidence at the trial, free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment. We therefore reverse the judgement below denying the writ of habeas corpus. Jackson v. Denno, supra at 1780-1781.

The Respondent's case relied heavily upon the agent CERVANTES' testimony that the Petitioner admitted his picture appeared in a certain identification card. Consequently, such statement is in the nature of a confession that Petitioner had his picture taken for such I.D. card. Therefore, pursuant to the holding in Jackson v. Denno, supra, Petitioner had a right to object to the use of such confession and to have a fair hearing and reliable determination on the issue of voluntariness.

> A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. Jackson v. Denno, supra at 1783

Petitioner did object to such admissions and was, therefore, entitled to a fair hearing on the issue of the voluntariness of such statements. However, the procedure used by the Court was similar to that used by the Court in the Jackson v. Denno case in that the Trial Judge merely took testimony of agent CERVANTES to make a preliminary determination and then left the ultimate determination of its voluntary character and also its truthfulness to the same jury that was to determine Petitioner's guilt or innocence.

As stated before, Petitioner was given no opportunity to present witnesses of his own concerning the voluntariness of the statements. As testified by agent CERVANTES, such witnesses did in fact exist, including not only the Petitioner, but also other officers and Petitioner's wife and son. By making the determination that the statements were voluntary, or that there was no evidence to substantiate that they were no voluntary, the Court committed reversible error by not holding a full voluntariness hearing.

It is Petitioner's contention that the Court mistakenly treated Petitioner's objection merely as a Miranda question as to when Petitioner is entitled to have his rights read. The real issue presented in this case is the voluntariness of the statements made by Petitioner and whether he is entitled to a fair hearing to make

that determination. It is Petitioner's position that officers of the government can not force a statement whether the Petitioner is in or out of custody and whether or not he is a focus of their investigation. Even if agent CERVANTES was not required to have read Petitioner his Miranda warnings prior to questioning him concerning the identification, the statement obtained from the Petitioner should not be admissable if it was not voluntary; and the statement should not be ruled voluntary without a full voluntariness hearing. The mere fact that statements made by Petitioner were attempted to be used by the Respondent, that Petitioner objected thereto, and requested a full voluntariness hearing entitled Petitioner to such a hearing, pursuant to the holding in Jackson v. Denno, supra. This was not done.

2. Petitioner Was Denied A Fair Trial As a Result Of The Court taking his motion for a judgement of acquittal under advisement.

Petitioner made a timely motion for a directed verdict and judgement of acquittal. At that time, the Court took the matter under advisement (Reporter's Transciprt, page 342, line 22) in spite of the fact that the Petitioner had not been identified by any of the witnesses presented by the Respondent. It is elementary that the identification of the Defendant is an essential element in any case. After the Petitioner had rested his case, the Prosecution even admitted that the Defendant had not been identified (see reporter's transcript, page 244). The evidence as it existed at the time the Government originally closed its case and Petitioner made his motion, was insufficient to go to the jury in that an

essential element was completely lacking. For this reason, the Court should have granted Defendant's motion as opposed to taking it under advisement.

Furthermore, by taking the motion under advisement the Court put Petitioner in the untenable position of having to second guess the Court. Petitioner was unnecessarily placed in a position of having to take a chance and present additional evidence which could potentially supply the Prosecution with any missing elements of its case or take a chance that an element was missing and the court would so rule by not presenting any evidence. Petitioner contends that the Court's placing him in this position by taking his motion under advisement while continuing with the trial in and of itself

denied Petitioner a fair trial in violation of his Fifth Amendment Due Process Rights.

The Court's error was compounded by the fact that in reliance thereon and in reliance on the fact that the Respondent had rested the Petitioner rested his case based upon the evidence which had theretofore been adduced. Subsequently, over Defendant's objection, the Court permitted the Prosecution to reopen its case to supply this essential element which Defendant understood to be missing at the time Defendant chose to present no evidence. Rule 29 (a) and (b), Federal Rules of Criminal Procedure, states:

> "Rule 29. Motion for judgement of acquittal.
>
> (a) Motion before submission to jury. Motions for directed verdict are abolished and motions for judgement of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion

shall order the entry of judgement of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgement of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of decision on motion. If a motion for judgement of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."
(Emphasis supplied)

It is thus evidently clear from the wording of the rule itself that taking the motion under advisement is discretionary only if made after the close of all of the evidence and is prohibited where made at the close of the prosecution's case, as was done here.

> "The Court may reserve a ruling on a motion for acquittal made at the close of all the evidence and submit the case to a jury. There's no such provision where the motion is made at the close of the government's case. The reservation to a Defendant of the right to offer testimony after the denial of a motion for acquittal made at the close of the government's case would be a futile thing if the Court could reserve it's ruling and force the Defendant to an election between resting and being deprived of the benefit of the motion. The introduction of evidence after the denial of a motion made at the close of the prosecution's case waives any error in the denial of the motion. T'Kach v. United States, 5 Cir., 1957, 242 F.2d 937. The ruling on the motion should have been made before the Appellant rested." Jackson v. United States, 250 F.2d 897 (1958).

This same reasoning was followed in the Ninth Circuit case of Sullivan v. United States, 414 F.2d 714 (1969) wherein the Court stated "it is mandatory requirement of Rule 29(a), that a motion for judgement of acquittal, made at the close of the government's evidence, be ruled upon before Defendant is required to

proceed with his evidence. Furthermore, Rule 29(a) does not require a Defendant to demand an immediate ruling in order to preclude the trial Court from reserving decisions." See also Cooper v. United States, 321 F.2d 274 (1963).

While the Court in Sullivan, supra, did go on to say that the failure to rule in that case was not prejudicial because the government's evidence, as it then stood, was sufficient to support the verdict, such was not the case here. At the time of Defendant's original motion, at the close of the prosecution's case, the Defendant had not been identified. Thus, a crucial element of the government's case was lacking. The evidence, as it then stood at the time of Defendant's motion, was such that it should have been granted.

The prosecution has attempted to present a red herring by arguing Defendant was not prejudiced by the government being permitted to re-open its case. However, unlike the case of Untied States V. Sisack, 527 F.2d 917 (1979), which the government cited as analogous, the Defendant did not waive this error by presenting any evidence. Defendant was forced, by the Court's taking the motion under advisement to not present a case in order to avoid waiving the error. See Jackson v. United States, supra at 901. As Defendant did not put on evidence, as was done in Sisack, supra, and Defendant had not been identified, the ruling on the motion should have been granted before the Defendant rested. Such error was therefore clearly prejudicial. While it is not clear from the opinion in Morgan v. United States, 380 F.2d 686 (1968), also cited by

the government, whether Defendant presented evidence in that case, there appears to be indications that he did so. Morgan, supra, is also distinguishable in that a motion for judgement of acquittal was not taken under advisement at the close of the Plaintiff's case. Although the government's motion to re-open may have been made diligently in this case, under the circumstances, it was not with sufficient diligence to prevent prejudice to Defendant, as it was made after Defendant's motion had already been taken under advisement in the absence of an essential element and after Defendant had rested, putting on no evidence. As Defendant did not waive the Court's error of taking the matter under advisement by presenting evidence while the motion was

being held under advisement, Defendant was prejudiced and the verdict should be reversed.

The United States Court of Appeals, Ninth Circuit seemed to agree in the first Memorandum opinion of March 17, 1982, (Exhibit B) although erring in the recitation of the sequence of events during the trial. The Court of Appeals seemed to commit additional error by subsequently amending its decision on April 30, 1982, (Exhibit C), presenting further grounds for reversal.

3. Petitioner Was Denied A Fair Trial As A Result Of The Court Denying Him An Opportunity To Present His Case After The Respondent Had Been Allowed To Reopen And Subsequently Reclosed It's Case.

Although the Respondent was entitled to present the final testimony, in the form of rebuttal evidence, it can not be argued here that such final evidence

constituted rebuttal. Petitioner having rested its case without presenting any evidence, there was nothing to rebut. The Respondent then proceeded to present additional testimony from agent CERVANTES. At the end of the direct testimony, Petitioner had no questions on cross examination. The Respondent then stated that it had nothing further and the Court at that point stated "very well".

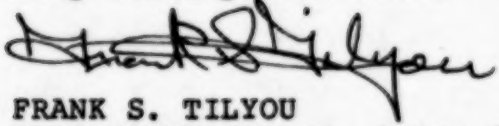
"Your may proceed then Miss Budge (Prosecuting Attorney) with the opening argument for the Government" (reporter's transcript, page 346). Either the Respondent had rested previously completely missing an essential element of its case, or it closed at this point whereat the Court immediately permitted it to proceed with its closing argument. If it closed at the earlier point, as argued previously, Petitioner's motion for

directed verdict and judgement of acquittal should have been granted. If it was closed at this later point, Petitioner should have been given an opportunity to present a case, had he so chosen. As evidenced by the transcript this opportunity was not given. Consequently, Petitioner's Fifth Amendment right to due process was violated.

CONCLUSION

For the reasons as stated herein, it is respectfully requested that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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